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No. 01-606

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS BEAUCLAIR, DIRECTOR, IDAHO DEPARTMENT OF CORRECTION, *et al.*,

Petitioners,

v.

NOEL PUENTE GOMEZ, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF OHIO AND 17 OTHER STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The amici States support Idaho's question that concerns standing, rewriting the question as follows:

(1) Whether a state prison inmate can establish standing to assert a claim of First Amendment retaliation based solely on a subjective "chill."

In addition, the amici States ask the Court to grant certiorari on the following question:

(2) Whether a state prison inmate who claims that state officials have retaliated against him for statements that he has made must plead and prove an "adverse action" involving what the Court described in *Sandin v. Conner*, 515 U.S. 472, 484 (1995), as a "restraint which imposes atypical and significant hardship in relation to the ordinary incidents of prison life."

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STATEMENT OF AMICUS INTEREST

Ohio and 17 other States support Idaho in urging the Court to review and reverse the Ninth Circuit's grant of relief on the amorphous prisoner retaliation claim at issue in this case – a type of claim that is becoming increasingly common.

Like Idaho, Ohio and the amici States all face the "inordinately difficult undertaking" of running their prisons, *Turner v. Safley*, 482 U.S. 78, 85 (1987), a "task that has been committed to the responsibility of [the legislative and executive] branches." *Id.* The States' concern arises from the acknowledged fact that administering prisons involves a "relationship of state prisoners [with] state officers who supervise their confinement [that is] far more intimate than that of a State and a private citizen," *Preiser v. Rodriguez*, 411 U.S. 475, 492 (1973). This circumstance leads the States to make routine decisions that are necessary to maintain order, yet are highly likely to provoke complaints from prison inmates.

The connection of this case to that task lies in prisoners' increasing use of First Amendment retaliation theory as an "end run" around the pragmatic limitations on due process claims already imposed by the Court. In *Meachum v. Fano*, 427 U.S. 215 (1976), and *Sandin v. Conner*, 515 U.S. 472 (1995), the Court recognized that a broad imposition of due process requirements on prison life would inevitably require judges to second-guess a great many operationally driven decisions. And the Court acknowledged in those decisions that such an intrusion would disrupt both prisons and courts, and would create a serious imbalance in the proper separation of executive and judicial power. Accordingly, *Meachum* and *Sandin* articulate strong limitations on prisoner due process claims.

But the decision below revives the problem of excessive judicial intrusion by allowing an alternate basis for challenging the same range of official operational decisions. To obtain judicial review of a decision that would otherwise be left to the informed discretion of corrections officials, all a prisoner need do, according to the court of appeals, is to claim that the decision was made with retaliatory intent. Since most prisoners who would lodge such complaints have lodged other complaints in the past, they can claim retaliation for seeking access to the courts, or, as in this case, an outspoken prisoner can claim that prison officials have retaliated against him for past criticisms that he has leveled against them.

Moreover, the Ninth Circuit's legal standard for retaliation claims is far more prone to abuse than the relatively straightforward due process criteria that themselves "led to the involvement of federal courts in the day-to-day management of prisons, often squandering judicial resources with little offsetting benefit to anyone." *Sandin*, 515 U.S. at 482. Unlike the due process calculus, which balances objectively verifiable interests (including the States' interest in controlling inmate behavior), retaliation cases turn on murky questions of subjective intent. That gives rise to a "serious problem: because an official's state of mind is easy to allege and hard to disprove, insubstantial claims" are often "less amenable to summary disposition." *Crawford-El v. Britton*, 523 U.S. 574, 584-585 (1998) (internal punctuation omitted). As a result, prisoners can make federal cases out of the most ordinary operational decisions simply by claiming improper motivation.

Inmates have recognized, and exploited, this circumstance by attempting to immunize themselves against adverse administrative actions, claiming that anything unpleasant that happens to them in even remote proximity to

protected conduct is retaliatory. "Retaliation" in such cases becomes a means to "bootstrap a frivolous complaint," *Brown v. Carpenter*, 889 F. Supp. 1028, 1034 (W.D. Tenn. 1995), and a prisoner should not be permitted to "immunize himself from adverse administrative action by prison officials merely by filing a grievance or a lawsuit and then claiming that everything that happens to him is retaliatory." *Id.*

Although the vast majority of such suits are ultimately won by corrections officials, the litigation process itself disrupts prison operations by distracting staff from normal duties and increasing friction within state prisons. A. Champagne & K. Haas, *The Impact of Johnson v. Avery on Prison Administration*, 43 Tenn. L.R. 275, 291, Table 6, 293-295 (1975) (a majority of wardens surveyed indicated that prisoner lawsuits distract staff from normal duties and increase tension, and that those problems increase in proportion to the amount of lawsuits); G. Cole, R. Hanson, and J. Gilbert, *Alternative Dispute Resolution Mechanisms for Prisoner Grievances: A Reference Manual for Averting Litigation* 5-6, 8 (National Institute of Corrections 1984) (making similar observations).

And prison walls do not limit the adverse affects of that legal manipulation. Every retaliation claim that seeks review of very ordinary, and presumptively valid, administrative decisions must itself be administered by some court somewhere. Each case must also be defended by some government agency. That consumes an inordinate amount of public resources.

Perhaps most galling, the decision below sets the threshold for inmate claims so low that it will result in many cases where there really is no controversy between the parties. Recall that the only injury shown in this case is a threat to transfer inmate Jones to another prison of

comparable security level. Jones suffered no injury other than a subjective "chill" that apparently was not severe enough to prevent him from pursuing this and at least one other case. Neither the threatened action nor the supposed consequences of that threat have any constitutional or practical significance. If that is all it takes for a prisoner to show an actionable injury, the nation's courts will soon be more overcrowded than its prisons. Judges will become functionally indistinguishable from wardens, with both having equal say on even the most mundane operational decisions so long as a prisoner asks the judge to intervene.

This case presents a vehicle to both solve those problems and to provide analytical symmetry in an area of law that federal courts address on a daily basis. That can be accomplished by two decisions from this Court. First, by granting certiorari. Second, by holding that a disputed government action does not inflict sufficient injury to sustain a prisoner retaliation claim unless it imposes an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life" for purposes of *Sandin*, 515 U.S. at 484.[1]

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[1] The amici States' submission differs in two important respects from that of the petitioner, the Idaho corrections director. First, the States believe that the genuine conflict among the Circuits primarily concerns the substantive-law standard of what constitutes "adverse action" in a prisoner retaliation claim. Second, the States urge the Court in part IV of this brief to adopt the *Sandin* standard, which is even more restrictive than the "ordinary firmness" standard advocated by the petitioner.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's prisoner retaliation theory warrants *certiorari* for several interrelated grounds. First, it conflicts with other Circuits' decisions and with decisions of this Court about the extent of injury necessary to satisfy Article III standing requirements. Second, it adds to the inter-Circuit confusion as to what type of injury is sufficient to sustain a prisoner retaliation suit. Third, it highlights an important federal question because existing law in most Circuits erodes the boundaries between the federal courts and state prisons in a way that undermines federalism, the separation of powers and state officials' ability to effectively carry out their exceedingly difficult duties. Fourth, it presents an opportunity to establish a bright-line rule that will remedy all of those ills: that disputed government action will not sustain a prisoner retaliation claim unless that action imposes an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin*, 515 U.S. at 484.

I. The Court Should Grant Certiorari And Consider What Injury A Prison Inmate Must Show In Order To Claim Standing In A Case Alleging First Amendment Retaliation.

The standing question that Idaho sets forth in the petition is important because prisoner retaliation claims threaten to vitiate the due process doctrine of *Meachum v. Fano* and *Sandin v. Conner*. This case furnishes an excellent example: by citing "retaliatory" threats of transfer, an inmate obtains a court order mandating a system of objective criteria for transfer that the Due Process Clause itself does not require. One of the solutions to this anomalous result lies in

clarifying the standing requirement in prisoner retaliation claims.

Settled law provides two levels of standing: there is the "irreducible constitutional minimum" of elements required for "case-or-controversy" standing under article III, *see Steel Company v. Citizens for a Better Environment*, 523 U.S. 83, 102-03 (1998), and in addition to the constitutional threshold, the Court has articulated "a set of prudential principles that bear on the question of standing." *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 474-75 (1982); *Bennett v. Spear*, 520 U.S. 154, 162-63 (1997). Both constitutional and prudential standing requirements are "founded in concern about the proper – and properly limited – role of the courts in a democratic society." *Bennett*, 520 U.S. at 162 (internal citation omitted).

The Ninth Circuit's "chill" doctrine cannot be reconciled with the Court's precedents. In the prison context the Court has emphasized that the "actual injury" requirement for standing "prevents courts of law from undertaking tasks assigned to the political branches." *Lewis v. Casey*, 518 U.S. 343, 349 (1996). Careful definition of both the scope of constitutional rights and the range of cognizable injuries is particularly important in the area of prisoner litigation because "federal courts do not sit to supervise state prisons," *Meachum v. Fano*, 427 U.S. 215, 229 (1976), and because state officers should remain "primary arbiters of the problems that arise in prison management." *Shaw v. Murphy*, 121 S.Ct. 1475, 1480 (2001). And the cert. petition correctly notes that the Court has specifically rejected mere "chill" as qualifying for "actual injury" that would meet the constitutional threshold. *See Laird v. Tatum*, 408 U.S. 1 (1972).

Perhaps one source of the Ninth Circuit's error lies in the existence of a genuine "chill" doctrine that applies to some First Amendment cases. The States acknowledge that when a plaintiff challenges a state law as "overbroad" under the First Amendment, that plaintiff can avoid the usual prudential limitations on standing and seek to void the law even if the injury in her own case does not manifest the First Amendment evil, and even though her own conduct could constitutionally be proscribed under a more narrowly drafted law. *See e.g., Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620, 634 (1980) (a "litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court"); *cf. Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503-04 (1985) (distinguishing facial challenge by plaintiff to whom the statute, but for overbreadth, could validly be applied, from a challenge predicated on unconstitutional application of a statute to the plaintiff).

But that "chill" doctrine in no way applies here. This case involves particular prisoners (the cert. petition focuses on plaintiff Bob Jones) complaining of specific official conduct. The district court rejected class relief, and specifically found that "acts of retaliation were isolated instances over a period of many years and did not pervade the entire class." District Court Order, at 35; Pet. App. 76-77. Therefore no law or even administrative practice forms the basis for a "facial" challenge here. And in any event, a plaintiff such as Bob Jones cannot invoke the genuine "chill" doctrine, because he was afforded relief based upon the specialized findings in his case – in other words, official authority in the opinion of the lower courts was exercised wrongfully in an "as applied" manner to Jones. *See Brockett, supra.*

Far from properly triggering a First Amendment "chill" doctrine, the case of prisoner Bob Jones presents an occasion for applying a diametrically opposed rule. By contrast with the loosened standard that applies in "overbreadth" cases, *Lewis v. Casey*, *supra*, closely tied the scope of the prisoner's constitutional right to the injury that qualifies the prisoner to sue: "The foregoing [actual injury] analysis would not be pertinent here if ... the right at issue – the right to which the actual or threatened harm must pertain – were the right to a law library or to legal assistance. But *Bounds* [*v. Smith*, 430 U.S. 817 (1977)] established no such right, anymore than *Estelle* [*v. Gamble*, 429 U.S. 97 (1976)] established a right to a prison hospital." *Lewis*, 518 U.S. at 350. In other words: since the prisoner's constitutional right was limited to a right to access the courts (and did not include a freestanding right to a prison library), the prisoner had to show an injury that actually involved an inability to access the courts. It was not enough to show that there was no prison library.

By parity of logic, the injury discussion in this case "would not be pertinent" if, as the inmates seem to assume and the Ninth Circuit seemed to agree, a prisoner has a right to always be free of any change (or threat of change) in the circumstances of confinement, to the extent that the change stems from the prisoner's exercise of expressive rights. Such a broad definition of First Amendment rights in the prison context cannot be reconciled with the basic premises of prison life, under which the state takes custody over the prisoner as a punishment for her offenses.

Further confirmation of the incongruity of the Ninth Circuit's injury-free standing rule comes from the jurisprudence acknowledging the contextual character of First Amendment protections. Two Circuits, the Sixth and the Second, explicitly subscribe to the sensible doctrine that

"[p]risoners may be required to tolerate more than public employees, who may be required to tolerate more than average citizens, before a [retaliatory] action taken against them is considered adverse." *Dawes v. Walker*, 239 F.3d 489, 493 (2nd Cir. 2001), citing *Thaddeus-X v. Blatter*, 175 F.3d 378, 398 (6th Cir. 1999). This logic accords with the Court's pronouncement in Eighth Amendment cases that "[t]o the extent that [prison] conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society." *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

Additionally, the two detriments identified by the Ninth Circuit in this case – prison transfer and Jones's resignation from a prison-library law-clerk position – in no way qualify as events triggering heavy constitutional scrutiny under these circumstances. Prison transfers – even where they impose some detriments on prisoners (a showing absent in the present case) – implicate no liberty interest cognizable under the Due Process Clause. *Hewitt v. Helms*, 459 U.S. 460, 467 n.4 (1983); *Meachum, supra; Sandin, supra.* And loss of public employment (assuming the law clerk position here qualified for that status) does not, in the absence of state law protection through tenure or civil service classification, trigger due process scrutiny even for a free public employee, let alone a prisoner. *Board of Regents v. Roth*, 408 U.S. 564, 577-78 (1972).

The Ninth Circuit's anomalous "chill" doctrine permits the prisoner to limit the power of prison officials to exercise custodial control based merely on the assertion that specific official acts potentially affect the inmate's exercise of expressive freedoms. That sort of reasoning has met with disapproval by this Court both within and outside the prison context. *See, Sandin, supra,* 515 U.S. at 484 (rejecting assertion by prisoner that "any state action taken for a

punitive reason encroaches upon a liberty interest under the Due Process Clause"); *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 285 (1977) (public employee should not be "in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing").

Thus, in the wake of the *Lewis v. Casey* analysis, the precise contours of the residual First Amendment right enjoyed by Bob Jones as a prisoner of the state bears on whether Jones has shown a sufficient injury for standing purposes. No such First Amendment injury is present here.

II. Certiorari Should Be Granted To Resolve The Substantive-Law Conflict Among Circuits Over What A Prisoner Must Show To Establish "Adverse Action" In The Context Of A First Amendment Retaliation Claim.

While the Circuits (broadly speaking) agree that a plaintiff claiming First Amendment retaliation must show "adverse action" that has a retaliatory motive, the appellate courts are split over what a prisoner must show to establish "adverse action." The practical problems posed by prisoner retaliation claims are aggravated by this lack of consensus on the extent of injury necessary to sustain them. Four different standards prevail and only this Court can tell the States which of them, if any, is the law. (In part IV below, the amici States support a heightened standard in prisoner cases.)

The first view holds that "when retaliatory conduct is involved, there is no independent injury requirement." *Dixon v. Brown*, 38 F.3d 379, 380 (8th Cir. 1994). The second, very closely related approach followed by the court below, is

that nothing more than a subjective chilling of expressive conduct is needed. Pet. App. 15.

The third is an objective standard, based on whether the disputed action "would deter a person of ordinary firmness from the exercise of the right at stake." *Thaddeus-X v. Blatter*, 175 F.3d 378, 396 (6th Cir. 1999)(quoting *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982)); *Dawes v. Walker*, 239 F.3d 489, 493 (2d Cir. 2001); *Allah v. Seiverling*, 229 F.3d 220, 225 (3d Cir. 2000); *Crawford-El v. Britton*, 93 F.3d 813, 826 (D.C. Cir. 1996) *rev'd on other gr'nds*, 523 U.S. 574 (1998).

Finally, the Fourth and Fifth Circuits require a showing of adverse impact upon the exercise of protected conduct. *ACLU of Maryland, Inc. v. Wicomico County*, 999 F.2d 780, 785 (4th Cir. 1993); *Johnson v. Rodriquez*, 110 F.3d 299, 314 (5th Cir. 1997).

In short, federal law is currently fragmented on this question. The States ask this Court to articulate a single, national standard in this case.

III. The Question Presented Is Important Because Prisoners' Use Of Retaliation Theory To Circumvent The Sensible Limitations Imposed By *Meachum v. Fano* And *Sandin v. Conner* Results In Undue Federal Intrusion Into Core State Functions, Undermines The Separation Of Powers, And Complicates Penal Administration.

The States need a definitive ruling because most of the standards applied perpetuate the same problems that *Meachum* and *Sandin* tried to stop—excessive federal

involvement in state prison operations, blurred distinctions between judicial and executive functions, and the resulting disruption of penal operations. The injury–free, subjective–chill and even the more objective "person of ordinary firmness" standard have resulted in lawsuits challenging actions quite properly left to the informed discretion of corrections professionals under *Meachum* and *Sandin*.

A. Federalism Concerns.

It cannot be gainsaid that the management of state prisons is a core state function. "The right to formulate and enforce penal sanctions is an important aspect of the sovereignty retained by the States," *Kelly v. Robinson*, 479 U.S. 36, 47 (1986), and the management of "penal institutions is an essential part of that task." *Procunier v. Martinez*, 416 U.S. 396, 412 (1974). Indeed, "it is difficult to imagine an activity in which a State has a stronger interest." *Preiser v. Rodriguez*, 411 U.S. 475, 491-492 (1973). That respect for State autonomy was at the heart of *Meachum*, which recognized that "[t]he federal courts do not sit to supervise state prisons, *the administration of which is of acute interest to the States*." 427 U.S. at 229 (emphasis added).

Most of the adversity standards applied to prisoner retaliation claims undermine the sovereignty *Meachum* and *Sandin* sought to preserve by providing non-existent, or unpredictable, criteria for subjecting presumptively lawful State decisions to federal review. The injury-free and subjective-chill standards prevailing in the Eighth and Ninth Circuits provide no check on federal review of state penal matters. The "person of ordinary firmness" standard controlling in the Second, Third, Sixth and District of Columbia Circuits, while somewhat of an improvement, is really not much of a standard at all, allowing individual

federal judges to determine which administrative decisions would or would not affect the hypothetical prisoner "of ordinary firmness." And tellingly, it too has led to federal scrutiny of state decisions that *Meachum* and *Sandin* indicate are mundane enough to be within the scope of a prisoner's lawfully imposed sentence. *See, e.g., Hall v. Sutton,* 755 F.2d 786, 787 (11th Cir. 1985) (allegedly retaliatory confiscation of tennis shoes, though not cognizable as due process claim, could proceed as retaliation claim.)

B. Separation of Powers.

It is similarly beyond dispute that day-to-day prison operations are consigned to the executive, not the judiciary. "[J]udicial deference is accorded not merely because the administrator ordinarily will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge, but also because the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial." *Bell v. Wolfish,* 441 U.S. 520, 548 (1979).

The injury-free and subjective-chill standards confuse, if not merge, the executive function of prison administrators and the traditional duties of judges. Because no significant threshold is set, any administrative decision, no matter how trivial, can become the subject of a retaliation case merely because a felon alleges improper motivation. Courts presiding over prisoner retaliation suits "inevitably would become the primary arbiters of what constitutes the best solution to every administrative problem [put at issue], thereby 'unnecessarily perpetuat[ing] [federal] involvement . . . in [the] affairs of prison administration,'" *Turner v. Safley,* 482 U.S. 78, 89 (1987) (quoting *Procunier,* 416 U.S. at 407). Those approaches improperly place the courts "astride the day-to-day functioning of state prisons and

involve the judiciary in issues and discretionary decisions that are not the business of federal judges." *Meachum*, 427 U.S. at 228-29.

The same is true of the more objective, but still inherently uncertain, "person of ordinary firmness" standard applied in the Second, Third, Sixth and District of Columbia Circuits. As discussed above, they routinely result in judicial review of administrative decisions that this Court has sensibly consigned to executive branch personnel. Instead of leaving such matters in the hands of officials possessing the "flexibility [] specially warranted in the fine-tuning of the ordinary incidents of prison life," *Sandin*, 515 U.S. at 483, that approach has resulted in such decisions being reevaluated through a system that is far more rigid and detached from the realities that give rise to prisoner cases.

C. Impact on Prison Management.

Those deviations from constitutional principles have real world impact. It must be remembered that the task of properly running their prisons is, among "the most vexing of all state responsibilities." *Id.* at 137 (Burger, C.J., concurring). Retaliation suits add to that burden "[b]ecause an official's state of mind is easy to allege and hard to disprove" and, no matter how insubstantial the underlying dispute, they are "less amenable to summary disposition []" *Crawford-El*, 523 U.S. at 584-585.

As the National Institute of Corrections has noted, "[c]ases that survive summary judgment often require defendants and other staff members to put in long hours conferring with counsel, answering interrogatories, giving depositions, preparing for trial... and testifying at trial. Many non-frivolous suits concern small monetary sums, and the time devoted to them by administrators is

disproportionate to the amounts involved." G. Cole, R. Hanson, and J. Gilbert, *supra*, at 5-6. Other staff members have to spend time retrieving, organizing and often redacting documents. And as the case moves to trial, additional sets of employees are diverted from institutional duties to transport prisoner-plaintiffs and inmate witnesses to and from court.

But the disruption is not limited to the diversion of staff members. It has far more serious consequences for the maintenance of order within the volatile prison environment:

> Even if correctional officials are able to "win" the suits against them, leadership may be hurt when wardens are placed on trial. In the adversarial process, plaintiff and defendant--prisoner and warden--are legally and symbolically equal, a fact that does not go unnoticed by those whom the warden must supervise.
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> * * *
>
> An institution whose prisoners have *successfully* sued administrators may find its staff fearful of becoming defendants in another lawsuit and thus reluctant to exercise discretion to solve festering and potentially serious problems. The emotional costs of litigation for staff and inmates may increase tensions, with ensuing management and security problems.

G. Cole, R. Hanson, and J. Gilbert, *supra*, at 5-6, 8.

Prison officials already face "Herculean obstacles" in dealing with the "complex and intractable"

problems of prison administration. *Procunier*, 416 U.S. at 404. Prisoners should certainly have redress for wrongful official action, but there must be some common-sense limits. The injury standards utilized by most Circuits impose few. The consequences warrant this Court's attention.

IV. This Court Should Adopt A Bright-Line Rule Based On *Sandin v. Conner.*

All of those problems can be addressed by the adoption of a clear standard that is rooted in this Court's prior decisions -- a holding that disputed government action does not inflict sufficient injury to sustain a prisoner retaliation claim unless it imposes an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life" for purposes of *Sandin*, 515 U.S. at 484. As would be developed more fully through their brief on the merits, the amici States submit that this result is strongly supported by three lines of analysis.

First, this Court has consistently recognized that special institutional needs justify differing treatment of the right underlying the claim at issue here, the First Amendment right of expressive conduct. The special needs of government agencies require that speech rights be defined differently in the public employment context from those enjoyed by the public at large outside that context. *See Waters v. Churchill*, 511 U.S. 661 (1994). The unique mission of, and demands upon, the military have resulted in limitation of Free Exercise rights in the context of military service. *Goldman v. Weinberger*, 475 U.S. 503 (1986). Finally, Fourth Amendment privacy and security interests balance differently when special needs justify intrusive government action. *Vernonia School Dist. 47J v. Acton*, 575 U.S. 646, 665 (1995); *Skinner v. Railway Labor Executives Ass'n*, 489 U.S.

602, 620 (1989); *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990).

This Court has repeatedly recognized the uniqueness of the prison environment and the resulting need to adjust the normal scope of First Amendment rights. The special demands of that environment equal or exceed those giving rise to the special rules just discussed. Hence this Court would not be breaking new ground in creating a specially crafted rule for prisoner retaliation cases. Indeed, it has already done so. See *Lewis v. Casey*, 518 U.S. 343, 355 (1996) (access to courts); *Price v. Johnson*, 334 U.S. 266, 285 (1948) (same); *Jones v. North Carolina Prisoners' Labor Union, Inc*, 433 U.S. 119, 125-26, 128 (1972) (association).

Second, the rule the amici States suggest is itself well crafted to address the problems discussed in the previous section. Although *Sandin*'s "atypical and significant hardship" test admittedly was not crafted for retaliation claims, it, like *Meachum* before it, was informed by the same federalism, separation of powers and practical considerations. 515 U.S. at 482-83; *Meachum*, 427 U.S. at 229.

Third, the *Sandin* standard would add symmetry to this area of law that is a staple of federal practice. Although their rapid growth has been checked by the Prison Litigation Reform Act, P.L. No. 104-134, 110 Stat. 1321, 1366 (Apr. 26, 1996), prisoner claims still make up a significant portion of the federal docket. Establishing a uniform threshold for federal review of penal decisions would not only simplify the evaluation of often-cryptic *pro se* pleadings, but would also add internal logic for determining which state decisions have sufficient import to warrant federal scrutiny.

CONCLUSION

For all the foregoing reasons, the petition should be granted.

Respectfully submitted,

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